STATE OF MICHIGAN

COURT OF APPEALS

NORTH RIVER INSURANCE COMPANY, Plaintiff-Appellant,	UNPUBLISHED January 17, 2003
v	No. 231711 Calhoun Circuit Court
ADVANCED ORGANICS INC., Defendant-Appellee.	LC No. 98-005401-CZ

Before: Murray, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting defendant's motion for summary disposition under MCR 2.116(C)(8) and (C)(10). We affirm.

This subrogation case arises out of a building fire allegedly caused by defendant's negligence. The fire burned the area leased by defendant along with other areas owned by the landlord and leased to a different tenant. Plaintiff, the landlord's property insurer, sued defendant in negligence to recover the insurance proceeds it paid as a result of the fire damage. The trial court held that defendant did not owe any duty to plaintiff and, therefore, granted summary disposition in favor of defendant. We review a trial court's grant of summary disposition de novo. *Guardian Photo Inc v Dep't of Treasury*, 243 Mich App 270, 276; 621 NW2d 233 (2000); *Wayne Co v Plymouth Twp*, 240 Mich App 479, 481; 612 NW2d 440 (2000).

I

"Absent an express and unequivocal agreement by a tenant to be liable to the lessor or the lessor's fire insurer in tort for negligently caused fire damage to the premises, the tenant has no duty to the lessor or insurer which would support a negligence claim for such damages." *New Hampshire Ins Group v Labombard*, 155 Mich App 369, 377; 399 NW2d 527 (1986). Plaintiff argues, however, that the lease between the parties contains such an agreement. It argues that ¶ 9 of the lease indicates that defendant has an express duty to pay for damages it causes to the premises. Paragraph nine of the lease states:

> Repair and Maintenance. The landlord shall, at its own expense, maintain and make necessary structural repairs to roofs, walls and floors as required to

> provide a weathered sheltered building except in the case where such repairs are the result of tenant's damage to the premises.
>
> The tenant shall, at its own expense, promptly make all necessary repairs and replacements to the premises where such repairs or replacements are the result of the tenant's damage to the same. Specifically included are doors, windows, wall partitions, plumbing systems, heating system, lighting system, fire sprinkler system, fixtures, and all other appliances and appurtenances.
>
> On default of the tenant in making repairs or replacements as a result of tenant's damage to the premises, landlord may, b[ut] shall not be required to make such repairs or replacements for the tenant's account, and the expense thereof shall constitute and be immediately collectable as additional rent.

Plaintiff further argues that ¶¶ 6 and 19 of the lease should be read together with ¶ 9, and that the conglomeration constitutes defendant's "express and unequivocal" agreement to be bound in tort for the fire damage. Paragraph nineteen states that defendant must insure "tenant and landlord against any and all liability . . . for injury to or death of a person or persons or damage to property occasioned by or arising out of . . . the use . . . of the premises . . . Such policy shall cover hazard insurance on the building." Paragraph six simply states, "Property tax and insurance for the building will be paid by the landlord, and tenant will pay personal tax and insurance for the content."

Plaintiff argues that these provisions, read together, demonstrate defendant's agreement to be held liable in tort for the damage it causes and to insure against that eventuality. This argument fails because *Labombard, supra* at 377, requires a tenant to expressly accept tort liability, not contract liability. Use of the phrase "[o]n default of the tenant," and the reservation of a contract remedy for such default at least create ambiguity with respect to the nature of the agreement. It is not enough that these provisions hint at the possibility of defendant's agreement to accept liability in tort; the lease provisions must "expressly and unequivocally" declare the agreement. *Labombard, supra* at 377.

II

Plaintiff next contends that the trial court erred when it granted summary disposition on plaintiff's claim for damages to areas other than the area leased because *Antoon v Community Emergency Medical Service, Inc*, 190 Mich App 592, 597; 476 NW2d 479 (1991), limited the *Labombard* holding strictly to the leased premises.

In *Antoon*, the defendant rented the rear shop area of a building for maintaining its fleet of ambulances. *Id*. at 593. An automobile dealership operated out of the front portion of the building. *Id*. Defendant's employee negligently started a fire in the rear portion of the building that spread to the front portion of the building and damaged personal property owned by the dealership. *Id*. at 594. This Court held that the *Labombard* holding did not shield the tenant from liability for the plaintiffs' personal property damage and the landlord's loss of rental income because "[a] lessee cannot reasonably expect that the rental payments will be used to insure against damages to items other than the leased premises." *Id.* at 597.

After this quoted language, however, the *Antoon* Court employed the signal "but see" and cited *Wausau Underwriters Ins Co v Crook*, 183 Mich App 462, 464; 455 NW2d 309 (1989), parenthetically explaining that the Court in that case held a hotel guest "not liable for negligent fire damage to other suites, not just the room being rented . . .." *Antoon*, *supra* at 597. Additionally, the *Antoon* Court did not hold that the plaintiffs could recover on the real property damage they suffered but against which they insured. *Id*. The *Antoon* Court apparently intended to distinguish it's holding from the *Wausau* holding, and preserve a tenant's immunity from liability for damage it negligently causes to its landlord's facilities. The understanding that a tenant reasonably expects its rent payments to cover the "expenses of maintaining the facilities, including fire insurance . . .." reinforces this finding. *Wausau*, *supra* at 462.

Because the areas burned by defendant's alleged negligence in the present case involved shared walls, entrances, foundation, and floor, defendant could reasonably expect that its rent payments, combined with the rent of others, would cover the facilities' fire insurance premium. The trial court did not err by holding that the lease lacked an "express and unequivocal" agreement by defendant to be bound in tort and subsequently granting summary disposition in favor of defendant.

Affirmed.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald